

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

* * *

BERYL HARTER, *et al.*,

Plaintiffs,

v.

CPS SECURITY (USA) INC., *et al.*,

Defendants.

Case No. 2:12-cv-00084-MMD-PAL

ORDER

United States Magistrate Judge Peggy A. Leen issued an Order denying Plaintiffs' Motion to Compel Defendants to Disclose Certain Attorney-Client Communications ("the Order"). (Dkt. no. 108.) The Magistrate Judge found that Defendants did not waive their pre-litigation privileged communications with their attorneys by raising certain defenses premised on their good faith compliance with the Fair Labor Standards Act ("FLSA"). Plaintiffs have objected to the Magistrate Judge's Order. The Court has reviewed Plaintiffs' Objections (dkt. no. 114) and Defendants' Response (dkt. no. 123) and affirms the Magistrate Judge's Order.

Magistrate judges are authorized to resolve pretrial matters subject to district court review under a "clearly erroneous or contrary to law" standard. 28 U.S.C. § 636(b)(1)(A); *see also* Fed. R. Civ. P. 72(a); L.R. IB 3-1(a) ("A district judge may reconsider any pretrial matter referred to a magistrate judge in a civil or criminal case pursuant to LR IB 1-3, where it has been shown that the magistrate judge's ruling is clearly erroneous or contrary to law."). "A finding is clearly erroneous when although

1 there is evidence to support it, the reviewing body on the entire evidence is left with the
2 definite and firm conviction that a mistake has been committed.” *United States v.*
3 *Ressam*, 593 F.3d 1095, 1118 (9th Cir. 2010) (quotation omitted). A magistrate’s pretrial
4 order issued under 28 U.S.C. § 636(b)(1)(A) is not subject to *de novo* review, and the
5 reviewing court “may not simply substitute its judgment for that of the deciding court.”
6 *Grimes v. City & Cnty. of San Francisco*, 951 F.2d 236, 241 (9th Cir. 1991).

7 The Magistrate Judge found that Defendants did not waive pre-litigation privileged
8 communications with their attorneys by raising affirmative defenses under FLSA sections
9 259 (safe harbor provision) and 260 (good faith defense which affects liquidated
10 damages) and claiming entitlement to the two-year statute of limitations because their
11 conduct was not willful under the FLSA. Defendants contend the evidence they intend to
12 offer in support of these defenses and in response to Plaintiffs’ willful violation claim are
13 (1) communications and advice from Ted Huebner, a licensed attorney, in his capacity
14 as a management consultant on compliance with federal and state wage and hour laws,
15 and (2) communications with U.S. Department of Labor (“DOL”) investigators.
16 Defendants represent they have not relied on confidential advice received from their pre-
17 litigation counsel to support these defenses. In reaching her decision, the Magistrate
18 Judge considered Mr. Huebner’s role and the evidence Defendants intend to offer to
19 support their defenses. In particular, the Magistrate Judge considered Defendants’
20 witness Mr. Coffey’s testimony that Mr. Huebner was hired as a management consultant
21 to ensure Defendants comply with the applicable laws and to develop the trailer guard
22 compensation policy at issue. She considered as persuasive the fact that Mr. Huebner
23 did not give legal advice and did not act in his capacity as an attorney. She also
24 considered the fact that Defendants have not sought to withhold any communications
25 with Mr. Huebner, including communications between Mr. Huebner and the DOL
26 regulators and Mr. Huebner and Defendants. The Magistrate Judge determined that the
27 evidence offered by Defendants to support their defenses is restricted to
28 communications with Mr. Huebner and with DOL staff. She found that on the records

1 before the court, Mr. Huebner did not act as Defendants' attorney. In sum, the Magistrate
2 Judge found that the disclosures made in support of Defendants' defenses are based on
3 non-privileged communications and advice from someone who was not acting in his
4 capacity as Defendants' attorney, and Defendants have therefore not put "at issue" any
5 privileged communications about the trailer guard compensation policy. The Magistrate
6 Judge concluded that because Defendants have not placed any privileged
7 communications at issue, no at issue waiver has occurred.

8 Plaintiffs raised a number of arguments to support their contention that the
9 Magistrate Judge committed clear error. They contend the Defendants have raised
10 claims of compliance that placed "at issue" communications with their pre-litigation
11 attorneys and allowing Defendants to assert a privilege over those communications
12 would be "unfair" to Plaintiffs. They argue that the Magistrate Judge erroneously
13 conflated the Ninth Circuit's "at-issue" standard for waiver into a "reliance" upon the
14 communication standard. They challenge the Order's application of a Ninth Circuit case
15 and failure to apply a district court case from another circuit.

16 The Court does not find that the Magistrate Judge's decision is clearly erroneous
17 or contrary to law. The Magistrate Judge properly applied the three-prong test articulated
18 in *United States v. Alani*, 169 F.3d 1189, 1195 (9thCir. 1999) for determining whether a
19 waiver of the attorney-client privilege has occurred. The Magistrate Judge found that the
20 defenses asserted are based on non-privileged, non-confidential communications and
21 advice from an individual retained as a management consultant, not as an attorney. She
22 further found that Mr. Huebner's role in advising Defendants was one of a management
23 consultant, and that Defendants have not sought legal advice from Mr. Huebner nor do
24 they claim any communications with Mr. Huebner is privileged. Plaintiffs argue that the
25 raising of the good faith claim creates a "fairness" waiver of all privileged
26 communications, but this argument ignores Mr. Huebner's actual role and the evidence
27 that Defendants offer to support their defenses. Again, Defendants offer all
28 communications with Mr. Huebner and with DOL staff, not privileged communications or

1 advice from their pre-litigation counsel, to support their defenses. Plaintiffs' other
2 objections are also based on their characterization of Mr. Huebner's profession, not his
3 actual role as a consultant giving Defendants non-privileged advice on compliance
4 issues and creating the trailer guard compensation policy at issue.¹ Defendants' reliance
5 on and offer of the non-privileged, non-confidential advice of a management consultant
6 who also happens to be a licensed attorney to support their defenses does not give rise
7 to implied waiver of all privileged communications with their attorneys over the same
8 subject matter.

9 Plaintiffs criticize the Order for omitting to address *Wang v. Hearst Corp.*, No.
10 12CV793 (HB), 2012 U.S. Dist. LEXIS 179609 (S.D.N.Y. Dec. 19, 2012), which they
11 claim is directly on point. *Wang* is not controlling authority and is distinguishable. In that
12 case, Hearst had raised a FLSA section 260 defense just as Defendants have done
13 here. The plaintiffs sought to compel disclosure of Hearst's in-house counsel's email.
14 Hearst opposed and contended it would not rely on legal advice to support its good faith
15 defense. The court noted that Hearst's human resource personnel's deposition
16 testimonies showed that human resources was not familiar with the reason for the policy
17 at issue and that Hearst's legal department may be able to explain the basis for the
18 policy. *Id.* at *7-8. Based on such a record, the court determined that Hearst's good faith
19 defense "undoubtedly raises the possibility of waiver" and ordered submission of the
20 emails at issue for the court's in camera review. *Id.* at *7. In contrast, the Magistrate

21
22 ¹For this reason, Plaintiffs' cited cases are not applicable and do not provide for
23 the broad waiver of attorney-client privilege theory that Plaintiffs advance here. For
24 example, in *Nguyen v. Excel Corp.*, 197 F.3d 200 (5th Cir. 1999), Excel raised similar
25 affirmative defenses under FLSA sections 259 and 260, but its representatives could not
26 explain the basis of these defenses when they were deposed without claiming their
27 reliance on counsel's advice or without first conferring with counsel during breaks. The
28 Fifth Circuit found that Excel waived the attorney client privilege because it failed to
object and because it selectively waived disclosure by permitting its representatives to
testify about privileged communications with counsel. *Id.* at 207-08. That court was
careful to clarify that its decision was not based on the fact that the defendant's
employees may have had difficulty explaining the bases for defendant's good faith
defenses. *Id.* at 208. It implicitly rejected the plaintiffs' argument that Excel placed at
issue the advice of its counsel by invoking affirmative defense under section 260.

1 Judge found that the evidence in support of Defendants' defenses do not involve
2 privileged attorney-client communications. Defendants' representative testified that Mr.
3 Huebner was retained to provide compliance advice and to create the trailer guard
4 compensation policy at issue. The Magistrate Judge found that no privileged
5 communications are placed at issue because Mr. Huebner was not acting in the capacity
6 of an attorney.

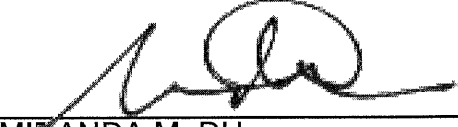
7 Plaintiffs also argue that the Magistrate Judge erroneously relied upon *Kaiser*
8 *Foundation Health Plan, Inc. v. Abbott Laboratories, Inc.*, 552 F.3d 1033 (9th Cir. 2008)
9 in finding against waiver. The Magistrate Judge concluded that Plaintiffs would not be
10 deprived of information vital to their case if Defendants are allowed to assert privilege
11 over communications with their attorneys because Defendants do not base their
12 defenses on any advice of these attorneys; instead, they offer communications with Mr.
13 Huebner and with DOL investigators to support their defenses. *Kaiser* supports the
14 broad conclusion that a party cannot seek access to otherwise privileged attorney-client
15 communications when the opposing party does not rely on such communications as a
16 defense. While Plaintiffs correctly note that *Kaiser* does not involve the same FLSA
17 affirmative defenses, the Magistrate Judge did not commit clear error in relying on
18 *Kaiser*.

19 Plaintiffs contend that the Magistrate Judge's ruling means that a party will never
20 be deemed to have waived privileged communications that it places at issue. However,
21 Plaintiffs' broad interpretation of the Order ignores the Magistrate Judge's specific
22 findings that, based on the records before the Court, Mr. Huebner did not act in the
23 capacity of an attorney, communications with him are not claimed to be privileged, and
24 they are offered in support of Defendants' defenses. The Magistrate Judge found that
25 Defendants have not placed all privileged communications about the trailer guard
26 compensation policy at issue by offering non-privileged communications from Mr.
27 Huebner. Plaintiffs have not demonstrated that the Magistrate Judge's decision is clearly
28 erroneous or contrary to law.

1 The Court notes that the parties made several arguments and cited to several
2 cases not discussed above. The Court has reviewed these arguments and cases and
3 determines that they do not warrant discussion or reconsideration as they do not affect
4 the outcome of the Court's review.

5 It is ordered that Plaintiffs' Objections to Magistrate Judge Peggy A. Leen's Order
6 Entered June 18, 2013 (Docket #108) Denying Plaintiff's Motion to Compel Discovery of
7 Certain Attorney-Client Communications (dkt. no. 114) is overruled. The Court affirms
8 the Magistrate Judge's Order.

9
10 ENTERED THIS 30th day of October 2013.

11
12 
13 _____
14 MIRANDA M. DU
15 UNITED STATES DISTRICT JUDGE
16
17
18
19
20
21
22
23
24
25
26
27
28